United Nations AT/DEC/1102

Administrative Tribunal

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1102

Case No. 1183: HIJAZ

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline Scott;

Whereas, on 8 December 2000, Kazim Hijaz, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 April 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*Section II*

Pleas

4. A) I would ... appreciate if the Tribunal could call the following witnesses ...

...

B) I would like to file an appeal against the following administrative decisions and discriminatory treatment exercised against me:

1) Terminating my service with the Agency prior to the expiry of my fixed-term appointment ...

2) [Refusing to approve] my request to release me on secondment to serve with the International Criminal Tribunal for Rwanda (ICTR), Arusha, Tanzania, and [by] considering that request a resignation;

...

4) Deletion of my post without following the Agency's policies ... [while] a similar post ha[d] been established in the Department;

5) ...

...

b) To consider the *approved* leave by the Administration to go to serve with ICTR ... abandonment of post ...

...

8) Disregarding and ignoring the [Joint Appeals] Board (JAB)'s findings about the "irregularities" of the Agency Administration's decisions ... [such as]:

a) Considering my request for secondment, as a resignation ...

b) [Failure by the] Administration [to declare the Applicant] provisionally redundant ...

...

C) I would like to request the Tribunal to recommend the following:

a) To reverse the Administration's decision to terminate my services prior to the expiry of my fixed-term appointment ...

b) To reverse the Administration's initial decision to separate my service with the Agency on resignation ...

c) To reverse the Agency's final decision to separate my service with it on abandonment of post ...

d) To approve my request to release me on a secondment to serve with ICTR, in Arusha, Tanzania, *to retain my functional title as Personnel Officer,* and not to consider that request as resignation or abandonment of post ...

...

g) To appoint me [to] the newly established post of Personnel Policy Officer, P-3 ... established in the Department ...

...

D) ...

to compensate me ... in [the] amount of US$ 7,000,000.00 ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 August 2001 and periodically thereafter until 30 June 2002;

Whereas the Respondent filed his Answer on 27 June 2002;

Whereas the Applicant filed Written Observations on 29 April 2003; and, on 25 June, the Respondent submitted comments thereon;

Whereas, on 9 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

On 27 January 1998 the Agency made an offer of appointment to the Applicant for the post of Personnel Officer (I), Grade 16, at the International Personnel Section, Headquarters, Gaza, for a one-year period, with a six-month probationary period. Subject to satisfactory performance, the contract would be extended for another year. The Applicant was also advised that his appointment was subject to the Area Staff Regulations and Rules. On 3 February 1998, the Applicant accepted the offer. The Applicant commenced his employment on 1 March 1998.

On 19 March 1998, the Applicant signed a fixed-term "Category X" letter of appointment, effective 1 March 1998, containing significantly different provisions to those contained in the original offer.

On 12 July 1998, the Applicant was given an overall rating of "*A very good performance*" in the Performance Evaluation Report (PER) for the first five months of his employment.

By facsimile dated 24 July 1998, the Chief, Personnel Section, ICTR, advised the Agency that ICTR would be interested in the Applicant's services on a fixed-term appointment for an initial period of one year, on the understanding that he be released on secondment. On 6 August 1998, the Applicant responded to ICTR, stating that it was not UNRWA's policy to release staff members on secondment, but

that he was "willing to resign" in order to take up an appointment with ICTR. On 27 August 1998, ICTR informed the Chief, Personnel Section, UNRWA, Gaza, that they would like to offer the Applicant an appointment, "based on his willingness to resign his position in UNRWA".

On 10 September 1998, the Commissioner-General approved a recommendation that the vacant P-3 post of Personnel Officer, International Personnel Section, Gaza, be frozen and that an International post of Personnel Assistant at the G-6 level be established instead.

On 20 October 1998, the Applicant wrote to the Deputy Commissioner-General, informing him that, although he had received an offer of employment from ICTR (which had a deadline of 5 November), he would prefer to stay with UNRWA, in a professional post, and requesting his assistance in this regard.

On 14 January 1999, following a proposal to that effect, the Commissioner-General approved the restructuring of the Human Resources Division, resulting, inter-alia, in the abolition of the Applicant's post. In a letter dated 27 January 1999, the Applicant was advised that his fixed-term appointment would not be extended beyond its expiration on 28 February 1999 and he was given 30 days' written notice. On 31 January 1999, the Applicant wrote to the Director of Administration and Finance, Gaza, requesting review of the decision to terminate his services, on the basis that the offer of appointment letter specified in paragraph 3 that, subject to satisfactory service, his appointment would be renewed for another year, and his letter of appointment stated in clause 3 that his appointment would automatically expire on 31 December 1999.

On 4 February 1999, the Applicant advised the Chief, Human Resources Division, that ICTR had again made him an offer of employment. He again requested to be released on secondment and asked for three days annual leave "prior to my departure to ICTR". The Director of Administration and Finance, Gaza, responded to the Applicant on 7 February 1999, accepting the Applicant's "resignation ... as ... requested" but noting that secondment could not be approved because the Applicant's post was being deleted. On 8 February 1999, the Applicant advised the Director of Administration and Finance, Gaza, that he had not submitted a resignation, and requested administrative review of the decisions to a) terminate his appointment and b) deny his request for secondment.

On 12 February 1999, the Applicant joined ICTR. On 15 February 1999, the Director of Administration and Finance, Gaza, wrote to the Applicant, confirming his "acceptance of [his] resignation", noting that this was "definitively in your best interest as compared to abandonment of post".

On 6 April 1999, the Applicant lodged an appeal with the JAB.

On 23 April 1999, the Applicant replied to a request from the Director of Administration and Human Resources, ICTR, dated 21 April, to immediately return documents that came into his possession in connection with his ex-position with UNRWA which were neither copied nor addressed to him personally, stating that he retained only copies, and that he had sent them to the JAB only, as "supporting documentary evidences to my appeal".

On 14 July 1999, the Applicant was offered, in writing, three months' base salary in lieu of provisional redundancy and also a termination indemnity, on the condition that his appeal was withdrawn. The Applicant rejected this offer.

The JAB adopted its report on 23 July 2000. Its evaluation and judgement, and recommendation read, in part, as follows:

"**III. EVALUATION AND JUDGMENT**

...

a) The Board noted that the administration's decision to consider the Appellant's request for secondment as resignation was not well founded since the Administration did not follow any rule or regulation governing that matter.

b) The Board noted that the Administration deleted the Appellant's post but it did not follow Personnel Directive A/9 concerning the deletion of posts and the staff member's status afterwards. It should have applied redundancy rules on him i.e. informing the Appellant that he is provisionally redundant and informing him of his entitlements according to that rule. Furthermore, the Board is of the opinion that the Administration should have waited until the end of the notice period and then apply any action necessary. Therefore the Board believes that the Administration [in accordance with] rule 109.11 ... should compensate the Appellant for the rest of his contract.

...

e) ... [T]he Board is of the opinion that the Appellant's conduct in arranging his travel to Tanzania while working with UNRWA is considered a hasty decision not taking into consideration the consequences, moreover, the Board believes that the Appellant should have reported back to duty after his annual leave to prove that he did not have the intentions of abandoning his post.

f) Based on the forgoing, the Board believes that the [Administration's] decision, despite its irregularities was taken without prejudice.

IV. RECOMMENDATION

26. ... [T]he Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be rejected.

However, the Board is of the opinion that the Appellant should be compensated as per rule 109.11."

On 5 September 2000, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him/her as follows:

"...

I have studied the Board's report. Regarding the Board's finding that the provisions of paragraph 14 of Personnel Directive A/9 on Redundancy should have been applied, it was the Administration's position and I agree with that position, that this was overtaken by events once you abandoned your post in February 1999. The Administration's decision to separate your services for reason of resignation, rather than for abandonment of post was well-intentioned and not prejudicial to you in any way. In this regard the Board correctly noted that your request for secondment of 4 February 1999 was late in view of the Tribunal's offer to start immediately and that your travel to Arusha was already arranged at a date (12 February 1999) which was only eight days later than your request. Further, the Board correctly stated that you should have reported back to duty after your annual leave to prove that you did not have the intentions to abandon your post. The Administration had no other option than to believe, and this was later confirmed, that you had accepted a job offer although you had clearly not been released on secondment. In view of the foregoing, I have accepted the Board's recommendation that the Administration's decision should be upheld and have dismissed your appeal.

By abandoning your post, you abandoned any entitlement to compensation you might have had, and, in any event, you have already refused a settlement in an amount equal to, at the very least, the most you might have received under Rule 109.11 had you not abandoned your post. Thus, I have determined that no compensation should be paid."

On 11 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant did not have the intention of abandoning his post. His decision not to report back for duty following his annual leave was only made after he had been informed that his post was being deleted and that the establishment of a

similar post was not foreseen in the future, and that the Agency had accepted his resignation.

2. The Agency's failure to give the Applicant an International staff appointment at P3 or a secondment to ICTR is evidence of bad faith against him as his wishes were clearly both in the Agency's interest as well as his own.

3. As he did not abandon his post, the Administration's decision not to apply the provisions on redundancy and compensate him accordingly amounted to prejudice.

Whereas the Respondent's principal contentions are:

1. The decision not to second the Applicant to ICTR was not prejudicial, as at no time the Agency has ever seconded a monthly paid staff member to another United Nations organization.

2. Even if the Applicant's actions did not amount to a resignation by necessary implication, the Applicant cannot be heard to complain when he is given a more favourable mode of separation (resignation) than his actions would have justified (summary dismissal or separation for abandonment of post).

3. The Respondent submits that the Applicant lost his right to a termination indemnity because his appointment was not terminated by the Agency in the manner contemplated by clause 17(B) of his letter of appointment, but by his own actions prior to the date when the Agency's termination was to take effect.

4. The Applicant has failed to discharge the burden to show that the administrative decision was motivated by prejudice or bias or that it was procedurally defective.

The Tribunal, having deliberated from 25 June to 21 July 2003, now pronounces the following Judgement:

I. The Applicant commenced employment with the Agency as a Personnel Officer (International) UNRWA Headquarters, Gaza, on 1 March 1998. The terms of his appointment were indisputably those offered to him by the Agency in its letter of 27 January 1998 which terms were accepted by the Applicant on 3 February. The Tribunal says "*indisputably*" as those terms were as of 1 March the only terms in existence. The

offer letter already referred to contemplated that the Applicant's employment would commence "*on or about 15 February 1998*"; that it would be for a fixed term of one year; that the Applicant would be required to serve a probationary period of six months duration; and that, subject to satisfactory performance, his appointment would be extended for a further year.

Because of reasons unknown to this Tribunal (and which do not effect the legal issues in the case) the Applicant's employment commenced on 1 March 1998, rather than 15 February, and because his performance was at all times satisfactory, the Applicant effectively acquired the right to a two-year term of employment commencing on 1 March 1998 and expiring on 28 February 2000, unless otherwise lawfully terminated. The offer letter of 27 January, expressly provided that the Applicant's appointment was to be subject to the Area Staff Regulations and Rules.

II. On 19 March 1998, nearly three weeks after he had commenced his said employment, the Applicant signed a letter of appointment referred to as a "Category X" letter of appointment, which set out terms very different to those which had been contained in the offer letter of 27 January and which, from the point of view of the Applicant, were very disadvantageous to him when compared with the terms contained in the letter of 27 January upon which he had been recruited. The circumstances whereby the Applicant had come to sign the "Category X" letter of appointment have never been explained, and the Tribunal has no knowledge thereof. In particular, the "Category X" letter of appointment provided, inter alia:

(a) That the Applicant would not be an Area staff member of the Agency;

(b) That the Area Staff Rules would not (save for where expressly set forth) apply to his appointment;

(c) That the term or duration of his appointment would be from 1 March 1998 to 31 December 1999;

(d) That the Applicant could be terminated with 30 days notice or no notice in the event of his abandoning his post;

(e) That, should the Applicant's appointment be terminated by notice, he would be entitled to a termination indemnity equal to one fifth of his base monthly salary for each month of uncompleted service; and,

(f) That his employment with the Agency would be governed exclusively by the "*present letter of appointment*".

Here again, it has never been explained why the Applicant should have been expected to surrender and did purportedly surrender his rights, privileges and obligations as a staff member as conferred by the letter of appointment of 27 January 1998 or why he agreed to an effective reduction in the duration of his contract or the duration of his employment from an expiry date of 28 February 2000 to an expiry date of 31 December 1999 or to what were, from his point of view, significant reductions or diminutions of his security and his entitlements in the event of the Agency deciding to terminate his "Category X" appointment.

Suffice it to say that the Tribunal entertains significant doubts as to the legality or efficacy of what may have been a unilateral alteration of the original terms on which the Applicant was appointed. The Tribunal is far from satisfied that the Applicant had voluntarily and effectively renounced or surrendered the valuable rights that he had acquired when he accepted the original offer of employment, which original rights were greater than those purportedly granted to him by the "Category X" letter of appointment.

This unexplained and mystifying purported alteration in the Applicant's conditions and this purported significant alteration in the parties contractual terms resulted in an absurd and appalling state of confusion shared by both parties, with neither the Applicant nor the Agency having any clear or consistent view as to what terms now governed their relationship or governed the Applicant's employment. The Applicant at times maintained and believed that his employment was governed by the original terms and at other times by the inconsistent terms as set out in the "Category X" letter of appointment. The Agency similarly took different and inconsistent approaches at different times, so that each party was apparently quite uncertain and confused as to which terms governed their contractual relationship.

III. By fax of 24 July 1998 to the Agency's Personnel Section, ICTR advised the Agency that it would be interested in acquiring the Applicant's services as a Personnel Officer for an initial period of one year and asked that the Agency consider releasing him on secondment for that purpose. It asked, in the event of the Agency being agreeable to the request, that the Agency should confirm that it would reabsorb the Applicant on the completion of his services with the Tribunal.

On 6 August 1998, the Applicant faxed a reply to the ICTR's said fax. He apparently did so on his own initiative rather than on instruction from his superiors or those with authority over him. He advised ICTR that the Agency did not release its staff on secondment but expressed his willingness to resign from the Agency and to take up the offered employment with ICTR.

The Applicant asks the Tribunal to ignore his fax of 6 August 1998 or to exclude it from their deliberations on the grounds that it was "*purely personal*" and not "*an official document*". Apart from the fact that the Applicant's said fax was on an official UNRWA facsimile form and that it had been sent in response to a formal communication sent by ICTR to the Agency rather than to the Applicant in some sort of personal capacity, the Tribunal must reject this submission. It is a document which is very clearly relevant to the issues which arise in these proceedings, and it throws light on matters which are very much in issue between the parties. In these proceedings, the Applicant maintains that there could have been no valid reason why the Agency should not have allowed him to move to ICTR on secondment and that its unwillingness or its refusal must have been actuated by personal spite or malice. The fax is a document in which the Applicant had acknowledged that it was not the Agency's policy to permit such transfers on secondment. The Tribunal knows of no principal of law applicable to the facts of this case that could rule a communication such as this inadmissible or that could justify exclusion of this communication from the Tribunal's consideration, and the Applicant's submission is accordingly rejected.

IV. In response to the Applicant's facsimile of 6 August 1998, ICTR indicated that it would be willing to employ the Applicant on the basis he had proposed, but the Applicant did not take up that offer at that time. The Tribunal assumes that the Applicant's change of heart arose as he had learned of proposed or intended restructuring planned or being considered for the Agency's Personnel Section and the Human Resources Division, and he felt that he might have better prospects if he remained with the Agency rather than transfer to ICTR.

It is clear to the Tribunal that the Applicant had become aware of or believed that the then Head of the International Personnel Section was planning to leave the Agency as of 31 July 1998, and the Applicant hoped or believed that his counter colleague would be promoted to fill that vacancy and the Applicant would in turn be promoted to fill the vacancy created by his counter colleague's said promotion. The Applicant, however, offers no evidence that he would have had a legal or legitimate expectation that he would enjoy

such promotion, but his memorandum of 20 October 1998 to the Agency's Deputy Commissioner General, Gaza, and to other persons clearly indicates that the Applicant had entertained such hopes. The Tribunal does not say that the ambitions entertained by the Applicant were necessarily unrealistic or unattainable, and it expresses no view thereon.

The Applicant's expectations, rather than being fulfilled, were absolutely shattered. The Personnel Section and the Human Resources Division were ultimately restructured in a way very different from the way the Applicant had hoped, and a number of posts were earmarked for deletion, including the post which was being occupied by the Applicant. The Applicant argues that because he was not offered promotion or any improvement in his conditions, and because his post was earmarked for abolition, this indicates discriminatory or prejudicial conduct against him. Here again, he offers no other evidence to support these allegations. The Tribunal is satisfied that there are no circumstances apparent which would warrant such an imputation or inference. It appears to the Tribunal that the restructuring proposed and ultimately implemented was on the face of it a valid and proper exercise of management discretion and finds no evidence to support a finding of malice or any impropriety in relation thereto.

V. In light of the decision which had been made to delete the post occupied by the Applicant, on 27 January 1999, he was written to and advised that his fixed-term "Category X" appointment would not be extended beyond its expiry date, which was stated to be 28 February 1999, and he was purportedly given 30 days written notice "*as required under Para 17 A of your Letter of Appointment*".

This letter of 27 January 1999 is yet another example of the confusion and uncertainty which reigned over what precise terms governed his contract with the Agency. The date "*28 February, 1999*" given as the date of expiration of his contract would have been the expiry of the first year, had he still been employed on the terms set out in the original letter of offer, but it would not have been the final expiry date under the terms set out in that letter, as he was entitled to be retained for a second year because his performance has indeed been satisfactory. Having thereby been advised that the Agency was still, in effect, maintaining that his contract was governed by the original offer letter rather than a "Category X" appointment, it is difficult to understand the reference thereafter to notice "*as required under Para 17 A of your letter of appointment*", as this was a clear reference to the terms of the "Category X" letter of appointment. He was employed either under one

contract or the other, and this letter clearly indicated hopeless confusion as to which terms ruled. Furthermore, had he been employed on the terms of the "Category X" letter of appointment, the expiry date would have been 31 December 1999 rather than 28 February 1999, some ten months earlier.

In any event, on receipt of the said letter of 27 January 1999, the Applicant was led to understand in the clearest terms possible that the Agency had decided to terminate him or to separate him from service at the earliest possible opportunity.

VI. In the circumstances, it was hardly surprising that the Applicant contacted ICTR, who confirmed that the offer of the appointment it had earlier made to him was still available to him, or that he should have decided to take it up at the earliest possible opportunity. It seems quite unreasonable to therefore suggest that his actions in taking up the ICTR offer could be said to have constituted a breach by the Applicant of his contractual obligations to the Agency, let alone misconduct which might have justified his dismissal.

The Applicant, by letter of 4 February 1999, duly advised the Agency that the ICTR post in Arusha was still available and that he wished to commence duties there as of 15 February, wanting to take three days annual leave to say goodbye to his friends and family and to journey more than 1,000 kms to Arusha. He again requested that they release him on secondment to ICTR for the initial period of one year, effective from 12 February. The Agency replied by letter of 7 February 1999, approving the three days annual leave but denying his request for secondment on the grounds that the post he was in was being deleted and that a similar post was not foreseen for establishment. The Agency agreed to accept the Applicant's resignation with effect from close of business on 11 February *"as you have requested"*. Whilst the Applicant had not offered his resignation effective from close of business on 11 February or from any time, it is clear from the correspondence and all the surrounding circumstances that the Agency had decided to treat the Applicant's departure to Arusha to work for ICTR as being tantamount to his resignation from the Agency. The Agency chose to categorise it or describe it as such for reasons that it, in good faith, believed to be in the Applicant's best interests, as it preserved for him benefits which he otherwise would have lost had it treated his departure as misconduct or as abandonment of post. When the Applicant had not returned for duty with the Agency on the expiration of the three days leave, and the Agency was aware that he had departed for Arusha and taken up duties with ICTR there, the Applicant can hardly complain that the Agency sought to

describe his departure in the terms most favourable to him and with consequences least harmful to him. The Tribunal is satisfied that although the description of "*resignation*" was not legally justified, it did no wrong or injustice to the Applicant nor does it give rise to grounds that would justify an award of damages or other compensation.

On 15 February 1999, when the Applicant had not returned for duty with the Agency and the Agency was then aware that he had taken up his post with ICTR in Arusha, the Director wrote to the Applicant advising him that his failure to return to his duty with the Agency constituted a ***clear case of abandonment of post but that it was in effect being treated as "an acceptance of your resignation" which is definitely in your interest as compared to abandonment of post.*** Accordingly, the Applicant was fully informed of the true situation, he knew there was no misunderstanding, and in the circumstances, his claim for compensation under this heading is dismissed.

VII. On 6 April 1999, the Applicant appealed to the JAB matters arising from the events which had occurred and which resulted in his separation from service with the Agency. It seems to the Tribunal to be relatively unimportant whether this separation should be described in these proceedings as having occurred by reason of resignation, expiration of contract, abandonment of post or other reason. The circumstances as to how and why it occurred are quite clear. In his appeal to the JAB, the Applicant complained, inter alia, of the following matters:

(a) That his contract with the Agency would have expired on 28 February 2000, because he had satisfactory performance, pursuant to the terms of the original contract whereby he had been recruited. He argues against what had been at one time, the Agency's contention, that his original appointment had been for one year, renewable for another year at the Agency's option.

(b) What he terms unequal treatment and discrimination because the Agency had declined to grant him leave to join ICTR on secondment.

(c) Wrongful designation of his separation from service by the Agency as "*resignation*".

(d) Deletion of his post within the Agency without regard to the relevant Area Staff Rules.

(e) Threatening to terminate his appointment for "*abandonment of post*".

(f) Conduct on the part of the Agency which the Applicant alleged was extremely degrading, unprofessional, abusive and discriminatory treatment, which he alleged had been exercised against him since 1 September 1998.

VIII. In early July 1999, the Respondent, through its Head Area Personnel Section and its Legal Adviser, sought to open up negotiations with the Applicant in relation to issues which had been raised in his appeal to the JAB. The Applicant indicated that should the Agency wish to make a settlement offer to him, it should make it in writing. By letter of 14 July 1999, the Applicant was offered, by way of settlement of his said appeal, the sum of three months net base salary in lieu of provisional redundancy and also a termination indemnity calculated in accordance with the "Category X" formula (one fifth of his base monthly salary for each month of uncompleted service) should he withdraw his appeal.

Needless to say, the Tribunal always recommends and encourages parties in dispute to seek to resolve their differences by agreement, so as to spare them the cost (both emotional and financial) of engaging in proceedings; to spare them the delays attendant on such proceedings; and, because it is usually easier for parties to live with and move forward on the basis of "*agreed settlements*", rather than to live under terms which have been decided and accordingly thrust upon them by an outside party. Such settlements further free up the United Nation's internal justice system so that backlogs there can be reduced or even cleared. Accordingly, the Tribunal feels that settlement negotiations should always be welcomed and never discouraged.

It is perhaps unfortunate that in this case the Applicant, who was not represented by legal counsel, did not fully appreciate the legal culture attendant upon such negotiations, which is that offers made by way of negotiation (rather than unqualified admissions of fact) are usually considered to be made without prejudice, meaning that such offers should not ordinarily be disclosed to the Tribunal or other body charged with determining the issues in dispute, if the settlement negotiations have not concluded successfully. This is because parties talking to see if the issues can be amicably resolved should be encouraged to make concessions for the purpose of the negotiations and should be encouraged towards frank exchanges of views and

should not be inhibited from so doing by a fear that such concessions might be held or used against them, should negotiations break down.

IX. In the instant case, because the Applicant had no legal counsel, he immediately perceived the Agency's settlement offer to be a sign of weakness, and perhaps he believed it was made because the Agency felt it had no answer to his case. He therefore sought to exploit his belief by forwarding the said letter of 14 July to the JAB for its information, hoping that its existence would persuade the JAB as to the merits of his case. He declined to accept the said settlement offer. He felt that the amount offered was inadequate and further felt it did not address or deal with many of the issues which he had raised. He responded by rejecting it and sought, inter alia, much enhanced or improved terms, including a term that he be installed in a newly created post within the Agency, which would have given him substantial promotion. He also sought payment of $7,000,000 as compensation for the wrongs that he alleged he had suffered at the hands of the Agency.

X. In the hope that what has happened in this case will not discourage parties in future cases from entering into settlement negotiations, the Tribunal hereby declares that for the future, it proposes to consider that settlement proposals falling short of unqualified admissions of fact are to be presumed to have been made without prejudice and should not be disclosed to JABs, JDCs or other such bodies or to the Tribunal, save with the expressed agreement of both parties. The Tribunal believes, that if parties who wish to enter into negotiations feel that matters conceded for the purpose of those negotiations might later be used against them should negotiations fail, this discourages negotiations and this would be detrimental to the administration of justice and to the achievement of resolutions of differences without confrontational and time consuming proceedings. In furtherance of its objective to further amicable resolution, the Tribunal proposes that parties be advised, when entering into negotiations, that if settlement offers or discussions are made in written instruments, such documents as may contain settlement proposals should be headed "*Without Prejudice*" or "F*or Settlement Purposes Only*". Also, in appropriate cases, it should be made clear to the parties to whom such documents are addressed that the content of such documents or the nature or terms of offers made should be confidential to the parties and should not be disclosed to other persons without the expressed agreement of all parties to the negotiations. They

should be advised that, in particular, the existence of such negotiations should not be disclosed to the body charged with the determination of the issues in dispute, should the settlement negotiations prove inconclusive.

XI. The Applicant's appeal to the JAB duly came on for hearing and, on 23 July 2000, it rendered its report and recommendations on the issues raised. In summary the JAB concluded:

1. That the Administration should not have taken the Applicant's request for secondment to ICTR and that his departure to Arusha to take up his position there was a resignation by the Applicant from his position with the Agency.

2. That the Agency should have applied the Area Staff Rules regarding redundancy to the Applicant, and in particular, referred to staff rule 109.11 and to the obligations thereunder to pay termination indemnity. It noted that the Applicant had made a late request for secondment, and it was of the view that he should have reported for duty after his annual leave, so as to prove that he did not intend to abandon his post.

3. It believed that the Administration had acted without malice or prejudice.

4. It recommended that the Applicant's appeal be dismissed but that he receive compensation pursuant to the terms of the "Category X" letter of appointment, namely one fifth of one month net base salary for each month of uncompleted service.

The Commissioner-General considered the report of the JAB. He advised the Applicant that he believed that any consideration of rules regarding redundancy had been overtaken by events, namely the Applicant leaving for Arusha in February 1999 and not having returned from annual leave. He accepted that the Administration had no option but to believe that the Applicant had accepted the job offer from ICTR, even though he had not been released on secondment. As a result, he accepted the JAB's recommendation that the Applicant's appeal be dismissed.

XII. In his submission to the Tribunal, the Respondent firstly submits that the Tribunal should find that the Applicant's terms of employment were those set out in the "Category

X" letter of appointment rather than the earlier letter which set out the terms upon which he had been recruited and upon which he had commenced his employment with the Agency. Nonetheless, the Respondent then sensibly recognised and conceded that the situation was not unequivocal and accepted that the "Category X" letter of appointment had been ignored or not recognised as applying from time to time. In view of the foregoing, the Respondent now readily concedes that 28 February 2000, being two years after commencement of the Applicant's monthly paid employment, should be construed as the appropriate date of the end of the Applicant's contract. This is the finding which would have been reached by this Tribunal, even if this concession had not been made.

XIII. The Respondent now submits that, whilst the view held and expressed by the Administration as of January 1999 - that the Applicant's contract with the Agency was for one year with the Agency having the option to extend it for a further year - was erroneous (the true position being that the Applicant had the right to an extension of that further year, his performance having been satisfactory), the letter of 27 January 1999 should be construed as a letter giving 30 days notice of termination in accordance with Clause 17 A of the "Category X" letter of appointment. Whilst the Tribunal understands the Respondent's submission as to what the finding should be, in the view of the Tribunal, such a finding could only be made if the Tribunal were to hold that both contracts could be read together and were compatible. In the view of the Tribunal, this cannot be done. The contracts cannot be construed as if the duration of the contract was to be determined by reference to the original letter of appointment on which the Applicant was recruited, while the termination provisions were to be determined by reference to the "Category X" letter of appointment. It can hardly be argued that the "Category X" letter of appointment was ineffective in relation to the duration of the contract but effective for only the term which dealt with termination.

The Tribunal is satisfied that the letter of 27 January 1999 did not accurately address the Applicant's true legal situation and was indeed erroneous when it stated that the expiry date for the Applicant's fixed-term appointment was 28 February 1999. This inaccurate letter was the proximate or immediate spur which caused the Applicant to take up the ICTR post. Seeing that the writing was on the wall and that the Agency intended to terminate his appointment at the earliest possible time, the Respondent can hardly now reasonably argue that the Applicant was in breach of his contractual obligations or was guilty of abandonment of his post in taking up the

ICTR position which was still available to him, let alone argue that the Applicant was guilty of misconduct in doing what he did. In the opinion of the Tribunal, the Applicant made an eminently sensible and proper decision in again seeking leave to take up the ICTR position on secondment, and knowing that this would be declined, in taking it notwithstanding that approval for secondment would not be forthcoming. He did no more than fulfil his duty to mitigate his loss. He was faced with the choice of almost immediate termination and unemployment, had he decided to remain for a further short time with the Agency, or alternatively, of taking up the position with ICTR in Arusha. As far as the Tribunal is concerned, he made the only appropriate and reasonable choice.

Accordingly, the Tribunal rejects the Respondent's submission that the Applicant constructively resigned or abandoned his post or otherwise breached his contract with the Agency.

XIV. The Respondent (again, properly, in the view of the Tribunal) has decided to put the settlement offer made in the course of the JAB proceedings back on the table and is willing to pay that to the Applicant.

XV. In the view of the Tribunal, however, the sum offered by the Respondent is not sufficient or adequate compensation for the Applicant in all of the circumstances. In the opinion of the Tribunal, this sum does not contain adequate compensation for the harm inflicted on the Applicant arising from the confusion created by the terms of his employment and the error made by the Administration as to when the contract, as per the terms of the original offer of appointment, expired. The Tribunal has already ruled that had the concession offered by the Respondent not been made, the Tribunal would have ruled that the Applicant's term would have continued until 28 February 2000, in the light of his satisfactory performance, unless lawfully terminated prior to that time. In the opinion of the Tribunal, the Applicant should be compensated in the amount equal to seven months net base salary.

XVI. The Tribunal, like the JAB, finds no evidence to support the Applicant's allegations of prejudice or malice. As to the Applicant's contention that there were no reasonable grounds upon which the Agency could have declined to allow

secondment to the ICTR post for its duration, this submission is rejected. Not only were the reasons advanced by the Agency for its refusal perfectly valid, but the Applicant had already acknowledged that it would have been against the Agency's policy and practise to have permitted such a move on secondment. He cannot now be seen to complain that this policy was adhered to in his case and that an exception was not made for him.

XVII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant seven months net base salary at the rate in effect at the time of his separation from service, as compensation; and,

2. Rejects all other pleas.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

/HIJAZ